IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-740

Keith L. Arthur, Petitioner

v.

United States, Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on August 3, 1979, affirming the judgment of the United States District Court for the Southern District of West Virginia entered on January 23, 1978, petition for rehearing denied on September 7, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals reversing the judgment of the District Court and remanding for a new trial is reported at 544 F.2d. 730 (4th Cir. 1976) and printed in the Appendix at pp. 2-20 . The opinion of the Court of Appeals affirming the District Court's rejection of petitioner's claim of double jeapordy, entered on October 25, 1977 is unpublished and printed in the Appendix at pp. 21-23 . The opinion of the District Court for the Southern District of West Virginia, entered on January 23, 1978 is printed in the Appendix at pp.24-27. The opinion of the Court of Appeals affirming the judgment of the District Court is reported at 602 F.2d.660 (4th Cir. 1979) and printed in the Appendix at pp. 28-40. The order dening the petition for rehearing is printed in the Appendix at p. 41.

JURISDICTION

The judgment of the Court of Appeals, printed in the Appendix hereto, was entered on August 3, 1979. The petition for rehearing was denied on September 7, 1979 and is printed in the Appendix hereto. On October 24, 1979, Mr. Justice Burger granted petitioner's application for an extension of time in which to file a petition for a

writ of certiorari to and including November 8, 1979. On October 18, 1979, Petitioner filed with this Court a motion for stay of execution of sentence and is awaiting a decision on said motion.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred by denying the Defendant's claim that the evidence introduced at trial was insufficient as a matter of law.

2. Whether the Court of Appeals erred in affirming the judgment of the District Court denying the Defendant's claim that he could not be retried because of double jeopardy where the evidence introduced at the initial trial was insufficient.

3. Whether the Defendant's right to due process and a fair trial were violated when evidence of the Defendant's prior trial was introduced into evidence and the Court of Appeals affirmed the District Court.

4. Whether the Defendant's Fifth Amendment rights were violated when he was compelled to be a witness against himself and the Court of Appeals found no reversible error.

5. Whether the Defendant's Attorney-Client Privilege and Right to due process were violated when his attorneys were called as witnesses against him and the Court of Appeals found no reversible error.

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED

The pertinent portions of the Fifth Amendment of the Constitution are set forth on page 35. The pertinent portion of 18 U.S.C. § 656 is set forth in the appendix at page 1 . The pertinent portion for the Federal Rules of Evidence, Rule 501 is set forth on page 37-38 .

STATEMENT OF THE CASE

Petitioner Arthur, hereafter referred to as Defendant, was convicted upon trial by jury on ten counts of an eighteen count indictment that charged him with the willful misapplication of federally-insured bank funds in violation of Title 18, U.S.C. § 656. The Court of Appeals reversed the judgment of conviction and remanded the case for a new trial. United States v. Arthur, 544 F.2d 730 (4th Cir. 1976). (Appendix pp. 2-20)

The matter was thereupon scheduled for retrial by the District Court and the Defendant filed several motions, including one in which it was asserted that the pending charges had to be dismissed for reasons of double jeopardy. The District Court denied the motion and the Defendant appealed. The Court of Appeals affirmed the District Court's denial of the subject motion by per curiam opinion. United States v. Arthur, No. 77-1535 (4th Cir. Oct. 25, 1977) (Appendix pp. 21-23). The District Court thereupon ordered that the retrial commence in two weeks.

The Defendant was found guilty on November 11, 1977, after a three-day jury trial on all ten of the remaining counts of the subject indictment. A motion was thereafter made on his behalf to set aside the verdict pursuant to

Rule 29 (c) of the Federal Rules of Criminal Procedure. The motion was denied by the District Court on January 11, 1978 and the Defendant was sentenced on January 13, 1978 to a total term of imprisonment of three (3) years and a total fine of five thousand dollars ($5,000.00). The execution of the sentences imposed on each count was suspended and the Defendant was placed on probation for a period of three years. A special condition of the probation was that the Defendant obtain full-time employment, without pay, at an approved charitable organization in the State of West Virginia for a period of two years.

On February 1, 1979, the Defendant appealed the judgment of conviction of the District Court and on August 3, 1979 the Court of Appeals affirmed the lower Court's decision. United States v. Arthur, 602 F 2d 660 (4th Cir. 1979) (Appendix pp. 28-40)

The Defendant's petition for rehearing was denied by the Court of Appeals on September 7, 1979. (Appendix p. 41) On September 11, 1979 the Defendant moved for a stay of mandate pending application to this Court for a Writ of Certiorari, said motion was denied by the Court of Appeals on September 14, 1979. (Appendix p. 42)

On October 24, 1979, this Court granted the Defendant's application for an extension of time in which to file a petition for a writ of certiorari to and including November 8, 1979. (Appendix p. 43). On October 18, 1979, Petitioner filed with this Court a motion for stay of execution of sentence and is awaiting a decision on said motion.

The Defendant was the President and a member of the Board of Directors of the Valley National Bank of Huntington, West Virginia, a national bank, during all time periods which are relevant to the subject charges. Tr. 82, 169, Gov't. Ex. 13(a) at 330. However, the Defendant was not in charge of the daily operations of the bank and, in fact, lacked a sufficient working knowledge of "day-to-day" banking procedures. Tr. 82. Rather, the Defendant's duties were directed toward public relations in attracting new business and otherwise maintaining satisfactory customer relations. Tr. 82-83, 236.

A particular bank account, commonly referred to as the "Borrowers' Life Insurance Account" (hereinafter referred to as "Borrowers' Account" or "account"), was established by a former employee of the bank, not the Defendant, before the time when the alleged offenses took place. Tr. 169-70.

The funds which were placed in the account were derived from the premium payments that were made by bank customers who had obtained insurance through the bank to guarantee the repayment of some financial obligation. Tr. 77-78, 169-70. No evidence was offered by the Government as to the purpose for which the funds had been placed in the Borrowers' Account, although it was conceded by prosecution witnesses that the account did not earn interest (even though it was income to the bank) and that it was the only one of its kind in existence. Tr. 79, 81, 173-74. The only evidence introduced at trial as to what the funds in the Borrowers' Account were to be used for was that offered by the defense to the effect that the account was originally established as a "VIP account" to "promote goodwill for the bank". Tr. 233-34, 249.

The Defendant caused varying sums to be withdrawn from the account over a three-year period, including the total sum of $1650. which he obtained on ten separate occasions, which said withdrawals formed the basis of the ten subject counts of the indictment on which he was ultimately convicted in the instant case.

No direct evidence was offered to the effect that the Defendant's use of the subject funds ever injured the

bank in a pecuniary sense. Indeed, the uncontradicted evidence established that the Defendant's efforts benefited the bank in a pecuniary sense. Tr. 96, 236, 271. Evidence was also elicited to the effect that the Defendant was one of the bank's largest stockholders such that his financial well-being was directly related to that of the bank. Tr. 96; Gov't. Ex. 13(a) at 330-31.

The Government presented as its main witness one Joseph F. RyKoskey for the apparent purpose of establishing that the Defendant utilized certain of the funds which he had obtained from the Borrowers' Account to bribe Mr. RyKoskey who, as Assistant State Treasurer for the State of West Virginia, was in a position to designate the banks in which the State would deposit non-interest bearing funds. Specifically, Mr. RyKoskey testified that he received various gifts and gratuities from the Defendant over a period of several years in the form of golf games, nominal amounts of cash for travel expenses, postage stamps, bottles of liquor and the sale of admission tickets for various political and/or charitable functions in return for which he favored the Defendant's bank" . . . to a certain extent" by the deposit of state monies. Tr. 127, 132-38. On cross-examination the witness admitted that

he did not feel at the time that the various gifts and gratuities that were provided him by the Defendant constituted bribery and that it was simply normal business practice for some twenty to thirty bankers to treat him as did the Defendant. Tr. 153-54, 156-58, 163-64. Mr. RyKoskey also admitted that the Defendant never requested any favored treatment when he provided the witness with any gratuity and that, in fact, he, RyKoskey, never even knew the source of the funds that the Defendant had used to obtain the various gifts and gratuities. Tr. 153-54, 156-58. Accordingly, there was no evidence offered by the Government to the effect that Mr. RyKoskey favored the Defendant's bank because he knew it was the source of the funds used to provide the various gratuities.

Among other things, the witness RyKoskey also stated that the total value of the various gifts and gratuities that he had received from the Defendant did not exceed the sum of one thousand dollars ($1,000.) over the total four year period involved and that the State had maintained deposits of as much as a half-million dollars or more at the Defendant's bank at various times during the same period. Tr. 162-63. Mr. RyKoskey also stated that

every banking institution in the State of West Virginia, with the exception of one, was authorized to receive state deposits and that he never penalized any bank that failed to provide him with gifts and gratuities by refusing to give it state funds for deposit. Tr. 128, 147-49.

The Government read to the jury as part of its case (over the continuing objection of the defense) the transcript of the Defendan't direct and cross-examination from the previous trial in the matter. Tr. 28-29, 33, 50, 115, 124, 205, 209; Gov't. Exs. 13(a)-(b_. The recorded testimony revealed that the Defendant freely admitted that the subject funds were used by him but he emphatically denied that they were utilized for anything other than promoting the goodwill of the bank. See e.q. Gov't. Ex. 13(a) at 273-74, 288, 317-20, 337-38. The Defendant specifically denied that he had converted any of the subject funds to his own personal use. Gov't. Ex. 13(a) at 317-20. Such a position was corroborated by other witnesses, including government rebuttal witness who testified that he was Chairman of the Board of Directors of the subject bank during the time period in question and he did not have any reason to believe that

the Defendant embezzled any bank funds. Tr. 236, 266, 271. The only evidence which contradicted the otherwise consistent statements of both prosecution and defense witnesses to the effect that the Defendant had not converted any of the subject monies to his own use was the isolated testimony of the government witness Humphreys who denied that she had ever received any political donation from the Defendant as he had asserted. Gov't. Ex. 13(a) at 292-93, Gov't Ex. 13(b) at 384-87; Tr. 200.

The defense presented the testimony of two witnesses who stated that they were both members of the Board of Directors of the bank during relevant time periods and that they were either aware of the specific existence of the Borrowers' Account and its general use by the Defendant or that they were at least aware that the Defendant utilized a source of funds for public relations purposes other than that which was regularly reported to the Board of Directors. Tr. 233, 235-36, 248-49. Both witnesses indicated that they were under the impression at the time that the account had been established as a so-called "VIP account" to be used for establishing and maintaining good customer relations. Tr. 233-36, 249. The Government

introduced in rebuttal the testimony of other members of the Board of Directors who variously testified that they did not know of the existence of the account or of its use by the Defendant, even though it was admitted that the Defendant was successful in his efforts to improve the well-being of the bank. Tr. 257-58, 263-64, 266-71.

REASONS FOR GRANTING THE WRIT

1. The Court should grant this Writ to decide if the Court of Appeals was in error by denying the Defendant's claim that the evidence introduced was insufficient as a matter of law.

In the first appeal of this case the Court held in clear and unequivocal language, that an essential element of the offense charged is an intent to injure and/or defraud the financial institution involved in a pecuniary sense. United States v. Arthur, 544 F.2d 730, 736 (4th Cir. 1976). The Court's ruling was based on the underlying purpose of the subject statute, ie, 18 U.S.C. § 656, "being to protect the assets of the Federal Deposit Insurance Corporation and of banks having a federal relationship". Accordingly, the Court

held that any definition of the essential term "injure" as "... meaning anything other than to cause pecuniary loss to the bank" would be erroneous. Id.

No direct evidence was offered at the trial herein to the effect that the Defendant had any conceivable intent to injure the bank in a pecuniary sense. Quite the contrary was shown by the Defendant's witnesses (Tr. pp. 233-236) as well as the Government's own witnesses. (Tr. p. 96, 271)

The Government asserted that the required intent to injure in a pecuniary sense was established by a permissible inference. (Tr. pp. 212-13, 216-18).

Specifically, the Government argued and the Court subsequently instructed the jury (over the objections of the defense) that if it was believed that the Defendant used the subject funds to commit bribery or to make illegal political contributions (as opposed to establishing and maintaining goodwill as contended by the defense) then the jury could find that he had the requisite intent to injure in a pecuniary sense. (Tr. 216-18, 225-28, 295-96, 376, 389). The Government's position was based on the following language in the

Court's decision in United States v. Caldwell, 544 F.2d 691 (4th Cir. 1976), decided before United States v. Arthur, supra:

> The defendant's wrongdoing was complete at the time when he made illegal payments in accommodations and services to Kelly and RyKoskey and their wives; at that point defendant had misapplied bank funds by using the money for an illegal purpose. Such misapplication injured the bank, and as such gave rise to the inference that the defendant had the requisite intent. United States v. Caldwell, supra at 696.

However, the Court in Caldwell never defined the "requisite intent", certainly, at least, not with the specificity, based on an examination of the underlying purpose of the subject statute, as it later did in the Arthur opinion. Therefore, it is respectfully submitted that the language in Caldwell is not controlling on the specific issue involved. Even if it is deemed otherwise, however, it is nevertheless asserted that the two opinions are not necessarily contradictory and that the so-called Caldwell inference simply does not apply to the case at hand, based on the evidence presented. Such a conclusion results from a consideration of the several essential elements of the subject offense and their interrelationship.

The offense of misapplication of bank funds has four essential elements as the trial Court correctly instructed the jury herein:

1/ That the accused be an officer, director, agent employee or otherwise connected with a bank or other lending institution;

2/ That the bank or other lending institution be a member bank of the Federal Reserve Bank or otherwise federally-insured;

3/ That there be a knowing and willful misapplication of the subject institution's funds by the accused; and

4/ That such act an/or acts be committed by the accused with the intent to injure and/or defraud the subject bank in a pecuniary sense. See United States v. Mann, 517 F.2d 259 (5th Cir. 1975), cert. denied, 423 U.S. 1087 (1975); United States v. Arthur, supra at 736.

When viewed in such terms, it is apparent that evidence of bribery can constitute the required "act" of misapplication which is complete, as noted in Caldwell, at the point in time when the illegal act occurs. United States v. Caldwell, supra at 696. However, such does not also necessarily establish the separate and distinct element of the intent to injure in a pecuniary sense as defined in Arthur. At most, Caldwell simply says that the fact-finder may infer such an intent from the evidence produced concerning the particular act and/or acts of misapplication.

The evidence of alleged bribery which was introduced in the instant case may have been sufficient to establish the required act of misapplication, but it could not under any interpretation provide a basis for the jury to infer the separate and distinguishable element of an intent to injure in a pecuniary sense where the uncontradicted evidence (as previously described herein) was that the Defendant's use of the subject funds necessarily involved, if anything, an intent ot improve the bank's financial status - not an intent ot injure it in a pecuniary sense as required for conviction.

The evidence may have been sufficient to support a conviction of the Defendant for the offense of bribery in violation of the relevant West Virginia state statute, but, of course, he was charged with the violation of a totally different federal law.[1]

Therefore, the evidence introduced was insufficient as a matter of law to sustain the conviction.

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[1] See United States v. Arthur, supra at 734-35 in which the relevant state statute is discussed, i.e., West Va. Code Ann. § 61-5A-3 (Supp. 1975).

2. The Court should grant this Writ to decide if the Court of Appeals was in error in affirming the judgment of the District Court denying the Defendant's claim that he could not be retried because of double jeopardy where the evidence introduced at the initial trial was insufficient to sustain a conviction.

The question arises as to whether or not principles of double jeopardy prohibit retrial in the instant case if the evidence presented at the initial trial proceedings was insufficient. Of course, the Defendant submits that the Court should have directed the entry of a judgment of acquittal for the reason that such relief is appropriate where it is precisely what should have been awarded the Defendant initially in response to his trial motions for judgment of acquittal and where, otherwise, any retrial is barred by principles of double jeopardy.

Supporting case authority to the effect that an appellate court, on reversing a conviction on the basis of insufficient evidence, should direct the entry of judgment of acquittal as opposed to simply remanding for a new trial is less than clear, if not simply inconsistent, depending on several factors. See, e.g., Thompson,

Reversals For Insufficient Evidence: The Emerging Doctrine of Appellate Acquittal, 8 Ind. L. Rev. 497 (1975); Comment, Double Jeopardy: A New Trial After Appellate Reversal For Insufficient Evidence, 31 U. Chi L. Rev. 365 (1964). Courts have variously held that an accused is only entitled upon appellate reversal to a new trial, as opposed to the entry of a judgment of acquittal, even though it has been determined that the evidence was insufficient to support the conviction, where: a/ the accused, in effect, "waived" any double jeopardy defense to retrial by undertaking the affirmative action of having the original judgment of conviction set aside by appeal;[2] or b/ where the accused had requested a new trial;[3] and/or c/ where the "original

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[2] Ball v. United States, 163 U.S. 662 (1896); Bryan v. United States, supra. A corresponding theory involving a "continuing jeopardy", that is, that the original trial, appeal, and any retrial are all part of one "jeopardy", as suggested by Mr. Justice Holmes in his dissenting opinion in Kepner v. United States, 195 U. S. 100 (1904), has never been accepted by a majority of the Supreme Court and has, in fact, been effectively rejected. United States v. Jenkins, 420 U.S. 358, 369 (1975). See Breed v. Jones, 421 U.S. 519, 532-34 (1975); United States v. Wiley, 517 F.2d 1212; 1215 n. 15-16 (D.C. Cir. 1975).

[3] See e.g., United States v. Musquiz, 445 F. 2d 963 (5th Cir. 1971)

defects of the prosecution" could be "cured" on remand.[4] Yet, other courts, having determined that the evidence was insufficient to sustain the subject conviction, have directed the entry of a judgment of acquittal, either on the basis of the discretionary authority enunciated in 28 U.S.C. § 2106,[5] or because, as Mr. Justice Douglas noted in his concurring opinion in Sapir v. United States, 348 U.S. 373, 374 (1955):

> The granting of a new trial after a judgment of acquittal for lack of evidence violates the command of the Fifth Amendment that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." See also United States v. Williams, 348 F.2d 451 (4th Cir. 1965), cert. denied, 384 U.S. 1022 (1965).

It is contended that the so-called "waiver theory", as first enunciated in the Supreme Court case of Ball v. United States, supra,

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[4] See e.g., United States v. Koonce, 485 F.2d 374 (8th Cir. 1973). An additional rationale for ordering a new trial rather than directing the entry of a judgment of acquittal is the balancing or "fairness test" employed in United States v. Tateo, 377 U.S. 463 (1966), whereby the interests of society in punishing those "whose guilt is clear" outweigh those of the accused in being subjected to multiple prosecutions for the same offense. However, it does not appear that such a rationale has been applied to situations involving an appellate determination of insufficiency of evidence, as opposed to reversal for reasons (Continued)

and reinforced by Bryan v. United States, supra, is logically indefensible and, more significantly, it has been overturned, in effect, by this Court's decision in Green v. United States, 355 U.S. 184 (1957). See Thompson, supra at 515-17. In Green, this Court held that the waiver of any constitutional right such as double jeopardy must be voluntarily and knowingly made and that to suggest that the noting of an appeal constitutes a waiver would effectively coerce the relinquishment of a constitutional defense:

> When a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he "chooses"

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[4] (Continued) of only prejudicial error, presumably because of the different considerations involved, as discussed subsequently herein. See Thompson, supra at 517-18 in which it is asserted that the Tateo fairness doctrine does not apply to cases involving reversals for insufficient evidence. See also United States v. Wiley, supra, n. 22.

[5] See e.g., United States v. Wiley, supra, United States v Dotson, 440 F.2d 1224 (10th Cir. 1971), and United States v. Bass, 490 F.2d 846 (5th Cir. 1974), in which the respective Courts directed judgment of acquittal pursuant to 28 U.S.C. § 2106 after determining that the evidence was insufficient.

> to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of a lesser offense. In short, he has no meaningful choice.
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> . . .
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> Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy. Green v. United States, supra at 191-92, 194 (citations omitted). See also Thompson, supra at 515-17; United States v. Wiley, supra at 1215-16.

The same basic logic as expressed in Green should apply with equal forcefulness to that authority which holds that an accused is not entitled to judgment of acquittal upon reversal if he had moved for a new trial as part of his requested relief on either the trial or appellate levels. Such a position necessarily requires the relinquishment of a constitutional right under less than voluntary circumstances. Thompson, supra at 518-19. Indeed, it is difficult to imagine that an accused should be penalized for taking advantage of every step available to him at the trial court level in order to avoid conviction and/or to correct a trial court's error in denying a well-founded motion for judgment of acquittal.

Motions, such as those for a new trial, whether properly so or not, are realistically more of an "involuntary reflex" of counsel to "make a record" and to otherwise do everything possible to avoid conviction without such standard motions constituting, at the same time, a conscious waiver of any constitutional claim of double jeopardy if the conviction were to be ultimately reversed. See United States v. Dotson, 440 F 2d 1224 (10th Cir. 1971). See also United States v. Wiley, supra, n. 24.[6]

It is also contended that such case authority as may suggest that retrial upon reversal is appropriate if any defects in the original prosecution could be cured on remand violates "the spirit, if not the letter" of the double jeopardy clause of the Fifth Amendment, at least

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6 The Fourth Circuit Court has noted that a conflict in authority exists as to whether only retrial could be ordered by an appellate court if the accused had moved for a new trial, but the Court held that it did not have to reach the issue since dismissal was the only possible relief under the facts of the case being considered. United States v Snider, 502 F.2d 645, 656 n. 24 (4th Cir. 1974). It must also be noted that the Defendant herein did, in fact, move for a new trial at the trial level. Defendant's Motion for New Trail, United States v. Arthur, Crim. Action 74-32-H (U.S.D.C. W. Va., filed August 28, 1974).

where the appellate reversal is based on insufficient evidence:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. Green v. United States, supra at 187-88.

Moreover, it is submitted that such a theory would not apply to the instant case in any event where, realistically, there is no possible way in which the Government could provide the necessary evidence on remand concerning the necessary intent to injure and/or defraud in a pecuniary sense. Accordingly, the Fourth Circuit held in United States v. Snider that directing the entry of judgment of acquittal was the only appropriate relief where such additional facts as would be necessary to support a conviction could never be realistically supplied on retrial. United States v. Snider, supra at 656.

It is respectfully urged that the only appropriate appellate relief upon a reversal for insufficient evidence

is to direct the entry of a judgment of acquittal, pursuant to the discretionary authority enunciated in 28 U.S.C. §2106 which provides, in part, that:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court...and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

The basis of such a contention is that the accused "is getting nothing more" than what he was entitled to at trial in response to his motions for judgment of acquittal. Thompson, supra at 497-98, 501-502; Comment, supra. The logic of the position is demonstrated, among other things, by the fact that if the accused's motion for judgment of acquittal had been granted at trial, as presumably it should have been if the evidence was insufficient, then certainly there is no doubt but that the accused could not have been retried since the Government has no right of appeal from even the improper granting of such a motion. Fong Foo v. United States, 369 U.S. 141 (1962). To hold that the Defendant whose trial motion for judgment of acquittal was improperly denied can be subjected to a second trial on remand would compound the judicial error already

committed, rather than rectifying it.

It is acknowledged that the Bryan decision in which this Court ordered a new trial was based on insufficiency of the evidence. It is also recognized that subsequent decisions such as Forman v. United States, 361 U.S. 416 (1960), have suggested that judgment of acquittal may only be appropriate in cases involving insufficiency of the evidence if the accused had not already requested a new trial, as the Defendant did in case at hand. However, it is submitted that the Bryan case should not be deemed controlling where it is based on the "waiver theory" which, as noted previously herein, has been rejected by this Court's subsequent decision in Green and where, otherwise, the issue of whether double jeopardy would prevent retrial in the particular situation involving an appellate determination of insufficient evidence was not clearly presented to the Court in Bryan or definitively ruled on in its decision. See Thompson, supra at 505-506, 511; Comment, supra at 365.

A distinction can and must be made between the type of relief that is appropriate for reversals that are based on procedural error and those based on insufficient evidence:

> The burdens on the defendant which the amendment was designed to prevent must be balanced against the public interest in protecting society from those guilty of crimes. When this balancing concept is applied to the problem of a new trial after appellate reversal, the practice of permitting new trials where the reversal was due to error can be justified. But a new trial after a reversal for insufficient evidence cannot be justified. Comment, supra at 370.

If appellate reversal is based on procedural error, then it is reasonable to assume that the prosecution has met its burden of proving the defendant guilty such that acquittal, rather than retrial, would unnecessarily thwart justice. Thompson, supra at 517-18. Consequently, appellate courts could rightfully become reluctant to reverse for procedural error so as to avoid acquitting the guilty. Comment, supra at 370-71. However, in the case of a reversal for insufficient evidence:

> (T)he considerations which justify a new trial after a reversal for error are lacking where the reversal is for lack of evidence. Instead of a presumption that the burden of proof of the prosecution has probably been met, the appellate court is specifically holding that the burden has not been met.
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> ...
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> No undue burden is imposed on society by releasing those defendants whose convictions have been reversed for lack of evidence. The oppression and harassment which the double jeopardy clause was designed to prevent is clearly present in a new trial following a reversal for insufficient evidence. For in

> the insufficient evidence case an appellate court is in essence saying, "Well, the prosecution did not prove you gulty this time but they can have another chance" ... the Court should explicitly recognize that the same considerations which prohibit a new trial where an accused has been acquitted at trial apply with equal force following an appellate reversal for insufficient evidence. Comment, supra at 371-72.

Furthermore, there appears to be a growing trend of authority in support of appellate acquittal in cases of insufficient evidence and it is important that this Court examine the issue and "clear the air".

With regard to whether the Defendant herein should only be granted a new trial where he had requested one on the trial level, it is contended, as asserted earlier herein, that the form of appellate relief should not depend on whether the accused made such a rather perfunctory motion, especially where a constitutional right, i.e., double jeopardy, "hangs in the balance." The distinction suggested by this Court in Forman and by lower court decisions as to why judgment of acquittal was ordered in Sapir and not in Bryan is unclear. Is is that either too much or indeed the wrong emphasis is being placed on the comments of Mr. Justice Douglas in his concurring opinion in Sapir:

> If petitioner had asked for a new trial, different considerations would come into play, for then the defendant opens the whole record for such deposition as might be just. Sapir v. United States, supra at 374 (citing Bryan v. United States). (concurring opinion).

It is just as plausible that Mr. Justice Douglas was merely making reference to the Bryan precedent (which being based in pertinent part on the "waiver doctrine", was effectively overturned by the subsequent decision in Green v. United States, supra, as asserted earlier herein) without, at the same time, necessarily endorsing its rationale. More importantly, Mr. Justice Douglas simply stated that if the accused had made a motion for new trial, an appellate court could, within its discretion to determine what was appropriate and just under the circumstances, order any relief, including a new trial, rather than only being able to direct entry of a judgment of acquittal. Sapir v. United States, supra at 423 (concurring opinion).

3. The Court should grant this Writ to decide if the Defendant's right to due process and a fair trial were violated when evidence of the Defendant's prior trial was introduced into evidence and the Court of Appeals affirmed the District Court.

The Government announced to the Court and defense counsel, out of the presence of the jury and before the introduction of any evidence, that it intended to offer into evidence and read to the jury the recorded testimony of the Defendant from the previous trial. Tr. 21-22. The Government raised the point for the apparent purpose of obtaining the Court's approval to delete any reference in the transcript to those charges on which the Defendant had been previously acquitted and to renumber all references to the remaining counts. Id. The defense agreed to the mechanical procedure suggested, provided the Court admitted such evidence, but it strongly objected to admissibility on several grounds. Tr. 22, 28-29. Specifically, the Defendant objected to such evidence for the following reasons: 1/ Even though the Defendant may have waived his rights against self-incrimination in the previous trial, he could not realistically be deemed

to have done so with regard to any subsequent proceedings; 2/ The introduction into evidence of the transcript would necessarily imply, if not directly indicate, that the Defendant had been found guilty by another jury of the same charges which would thereby violate his constitutional right to a fair and impartial jury; and 3/ The use of such evidence in the matter suggested by the Government would deny the Defendant his basic right of confrontation where he could not cross-examine anyone. Tr. 22-25, 28-29.

The Court, after having taken the matter under advisement, asked the defense whether it conceded the issue that the subject testimony was given voluntarily by the Defendant at the previous trial. Tr. 29. The defense asserted that although there was no doubt that the Defendant had to know that anything he said in the prior proceeding could be used against him in that trial, he nevertheless could not be deemed to have testified voluntarily in the sense of knowing that such testimony could be used against him in a subsequent proceeding. Tr. 29-30. The defense also reiterated its position to the effect that the use of such evidence by the Government would necessarily indicate that the Defendant was found guilty of the same charges by another jury. Tr. 32.

The Court indicated that it would permit the Government to read the subject transcript to the jury if it made the appropriate deletions and corrections. Id. The continuing objection of the defense was also noted for the record. Tr. 33-34.

Thereafter, the Court inquired of defense counsel again ". . . whether or not it is conceded that the defendant knew at the time he took the stand in the previous trial that he was not required to do so and that he was not required to make any statement for or against himself." Tr. 34. Defense counsel respectfully declined to stipulate the point although it was conceded that the defense did not have any evidence to the contrary. Id. The Court, over the objections of the defense, thereupon ordered the Defendant to testify as its witness concerning the issue. Tr. 34-35. Upon inquiry by the Court, the Defendant stated that he did not recall whether or not he had been advised during the trial proceedings of some three years that he had a right not to testify if he so chose. Tr. 35-37. The Court then inquired of the Government whether it intended to call as witnesses in regard to the issue the two attorneys who had represented the Defendant in the earlier trial.

Tr. 40. The Government reluctantly did so after the Court informed it that the subject testimony would not be admitted into evidence in the absence of such testimony. Tr. 40-41, 43. Both attorneys invoked the attorney-client privilege in response to being questioned on the issue involved and the Defendant declined to waive said privilege. Tr. 42-43, 46-47. The Court compelled both witnesses to respond and they stated that the Defendant had been properly advised by them in regard to the matter. Tr. 43-47.

The Court thereupon held that the Defendant had been sufficiently advised in the prior trial that he did not have to testify if he did not want to and that anything he said could be used against him. Tr. 50. Accordingly, the Court ruled that the Defendant had testified voluntarily and that the transcript would be admitted into evidence as requested by the Government. Id. The Defendant's continuing objection was again noted for the record. Id. Thereafter, the Government read the edited transcript to the jury and an accurate copy was introduced into evidence as Government't exhibits 13 (a) and (b). Tr. 114, 124, 209.

It is asserted for the reasons more fully set forth

hereinafter that although it may be permissible under certain circumstances to allow the prosecution to introduce in its case the recorded testimony of an accused from an earlier trial proceeding, nevertheless, the Court committed reversible error in the instant matter with regard to the procedure which was utilized by it to determine the admissibility of the proposed evidence as well as by permitting the subject use by the Government of an edited version of the subject testimony which made numerous references to evidence which was introduced in the earlier trial (but which was not before the jury in the instant case) and the obvious fact that the Defendant had been tried and found guilty of the same charges by another jury. It is therefore submitted that the Defendant was denied his constitional right to a fair and impartial jury and his right to due process of law in violation of the Fifth and Sixth Amendments.

4. The Court should grant this Writ to decide if the Defendant's Fifth Amendment rights were violated when he was compelled to be a witness against himself and the Court of Appeals found no reversible error.

The Fifth Amendment of the Constitution provides:

> (N)or shall (any person) be compelled in any criminal case to be a witness against himself....U.S.C.A. Const. Amend. V.

The fact that the Defendant did not incriminate himself when he did testify as the Court's witness "begs the question" since the essence of the constitutional right involved prohibits one from even being called as a witness against himself. cf. United States v. Murray, 297 F.2d 812, 818 (2nd Cir. 1962). Cert. denied, 369 U.S. 828 (1962). Neither the prosecutor nor court may call a witness to the stand, absent a valid waiver of the 5th Amendment privilege, State v. McKenzie, 303 A. 2d 406, 17 Md. App. 563 (1973).

In Couch v. United States 409 U.S. 322, 34 Led 2d 548, 93 S Ct. 611 (1973) this court said citing Holt v. United States 218 U.S. 245, 252-253, 54 LEd 2d 1021, 31 (1910).

> "prohibition of compelling a man... to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him."

This Court went on to say that it is extortion of information from the accused himself that offends our sense of justice. Couch at 328. Further, citing Murphy v. Waterfront Comm'n., 378 U.S. 52, 55, 12 LEd 2d 678, 84 S Ct 1594 (1964), this Court said:

> "(O)ur unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a fair state-individual balance by requiring the government...in its contest with the individual to shoulder the entire load,'... our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life..." Couch at 329.

The importance of preserving the privilege against self incrimination is basic to the constitution. As stated in United States v. Nobles, 422 U.S. 225, 45 LEd 2d 141, 95 S. Ct. 2160 (1975), the constitutional guarantee protects individuals against forced disclosure of a testimonial or communicative character as in the case at bar. Counselman v. Hitchcock 142 U.S. 547, 35 LEd 1110, 12 S. Ct. 195 (1892); Malloy v. Hogan 378 U.S. 1, 12 LEd 2d 653, 84 S. Ct. 1489 (1964) Miranda v. Arizona 384 U.S. 436, 16 LED 2d 694, 86 S.Ct. 1602 (1966).

Nothing is more basic and more fundamental than the constitutional right to remain silent and this Court should review this case to correct the violation of the defendant's rights.

5. The Court should grant this Writ to decide if the Defendant's attorney-client privilege and right to due process were violated when his attorneys were called as witnesses against him and the Court of Appeals found no reversible error.

Rule 501 of the Federal Rules of Evidence provides in pertinent part as follows:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

The so-called attorney-client privilege which precludes the disclosure of the substance of any confidential communication that takes place between lawyer and client (subject only to certain basic qualifications and restrictions) is well recognized by ". . . the courts of the United States in the light of reason and experience":

> (1) Where legal advice of any kind is sought (2) from a legal adviser in his

> capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived. United States v. Tratner, 411 F.2d 248, 251 (7th Cir. 1975) (citing 8 J. Wigmore, Evidence § 2292 (McNaughton rev. 1961). See also, 81 Am. Jr. 2d. Witnesses, §§ 142, 172-229 (1976 ed.); 2 A M.J., Attorney and Client, §§ 33-37.(1978 ed.) (citing cases).

It is asserted that the privilege was violated in the instant case when the Court compelled the Defendant's attorneys to state whether or not they had advised him in the previous trial proceedings of the consequences of his choosing to testify in his own behalf. Certainly the communication about which the Court inquired was of an obviously confidential and legal nature where it dealt with the crucial issue of whether or not the Defendant should testify. Furthermore, as evidenced by the testimony that was elicited from counsel, the privilege was not waived by virtue of the communications having being made to, or in the presence of, any third, "non-legal" parties. Moreover, the defense had objected to the entire procedure that was utilized by the Court in determining the issue of "voluntariness", including the Defendant being called

as the Court's own witness, and the Defendant specifically declined to waive the attorney-client privilege at the appropriate point when the relevant question was asked of the witness. (Tr. 34-35, 43). Accordingly, it is contended that the privilege was not waived by the Defendant and that his constitutional right of due process was therefore violated.

CONCLUSION

For the reason aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Of Counsel,

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APPENDIX

18 United States Code, Section 656

Theft, embezzlement, or misapplication by bank officer or employee.

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-2276

UNITED STATES OF AMERICA, Appellee,

-versus-

KEITH L. ARTHUR, Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. K. K. Hall, District Judge.

Argued: June 11, 1976. Decided: November 4, 1976.

Before CRAVEN and RUSSELL, Circuit Judges, and KUNZIG, Judge, United States Court of Claims.*

Dennis W. Dohnal (Murray J. Janus, Bremner, Byrne, Baber and Janus; R. R. Fredeking, II, on brief) for Appellant; Frank E. Jolliffe, Assistant United States Attorney (John A. Field, III, United States Attorney, on brief) for Appellee.

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* Sitting by designation.

RUSSELL, CIRCUIT JUDGE:

The appellant Keith L. Arthur was convicted, after a jury trial, on nine counts of an eighteen-count indictment alleging misapplication of bank funds in violation of 18 U.S.C. § 656.[1] He was sentenced to concurrent terms of imprisonment, the longest being three years, and fined a total of $12,000.

He appeals, contending that various of the trial court's instructions were erroneous, that the trial court improperly ascertained the nature of the jury's disagreement when it appeared to be deadlocked,

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[1] Section 656, 18 U.S.C. provides in pertinent part:

> Whoever, being an officer (or) director ...of ... any national bank or insured bank ..., embezzles, abstracts, purloins or wilfully misapplies any of the moneys, funds or credits of such bank ... shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $1,000, he shall be fined not more than $1,000 or imprisoned for not more than one year or both.

that a subsequent supplemental charge was erroneous in that it repeated some but not all of the original instructions, and that the admission of certain testimony relating to alleged bribery and illegal political contributions by appellant was error.

We reverse and remand for a new trial.

I

Appellant was the President, a member of the board of Directors and a major shareholder of the Valley National Bank of Huntington, West Virginia, a federally insured institution. His primary responsibilities as a bank officer were to attract new business and to maintain satisfactory public relations.

The government's evidence established that on eighteen occasions during the period from October, 1970, through September, 1973, appellant received funds from an account which apparently contained the bank's profit from the sale of credit life insurance in connection with its loan operations.[2]

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2 The government's evidence tended to show a total amount withdrawn of $2,810, but appellant admitted receiving only $2,110. The difference is the result of a disagreement as to the amount received by appellant on October 4, 1972. Appellant was acquitted on the count pertaining to that withdrawal.

Each of these occasions formed the basis of one count of the indictment. Appellant testified that he used the money so obtained to entertain, do favors and buy gifts for state and party officials who might be influential in securing government deposits for the bank.[3]

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3 For example, appellant testified that on various occasions he used $120 to buy postage stamps for West Virginia Assistant State Treasurer Joseph RyKoskey who had some control over the deposit of state funds in local banks, $50 to buy cards for a member of the State House of Delegates who, appellant hoped, might be helpful in obtaining certain state accounts for the bank, $25 to pay the expenses of a golf outing with RyKoskey (including reimbursing RyKoskey for his travel expenses), $150 to buy Jackson Day Dinner tickets from RyKoskey, $100 to join Republican Century Club, $10 to purchase Heart Association raffle tickets from RyKoskey, $400 as a contribution to State Treasurer Kelly, $50 to give, as a contribution to the Republican Party, to the state National Committeewoman who was helping to secure a post office account for the bank, $100 to buy Inaugural Gala tickets from the State Road Engineer who was helpful with respect to the "bridge account," and $40 to purchase tickets to the Inaugural Ball for RyKoskey. Appellant testified to numerous other expenditures which were substantially similar in nature to those set forth.

The government's position is that appellant's testimony, if believed, discloses the use of bank funds to pay unlawful bribes and to make illegal political contributions[4] and that such use constituted a misapplication of those funds in violation of 18 U.S.C. § 656.[5] Appellant, on the other hand, contends that he used the funds only for legitimate business expenditures for the purpose of creating and maintaining goodwill toward the bank among potential customers and persons who might be influential with potential customers.

II

After instructing the jury that paying bribes and making illegal political contributions with bank money constitute a misapplication of that money, the district court instructed that

> the payment of money to government officials for the purpose of obtaining deposits of government funds in the bank and to influence the judgment of such officials in connection with such deposits is, in itself, illegal in that such activity constitutes the bribery or attempted bribery of public officials.[6]

The use of bank funds for the illegal purposes of bribing state officials or making unlawful political contributions constitutes a misapplication of those funds within the meaning of 18 U.S.C. § 656 regardless of any anticipated benefit to the bank, United States v. Caldwell, (4th Cir. 1976) ___F. 2d___ (No. 75-2149, decided August 17, 1976). There was evidence at trial from which a jury, if properly instructed, might have found that appellant

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4 See 18 U.S.C. § 610:

> It is unlawful for any national bank... to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office...

5 Insofar as the record shows, however, the government has never sought to indict appellant for bribery or of making illegal political contributions.

6 A similar definition of bribery was given at the beginning of the court's instructions.

had used bank funds for such purposes. Therefore, contrary to appellant's contention, it was proper to instruct the jury as to bribery and illegal contributions. However, the district court's instruction on bribery, as set forth above, was erroneous in that it failed to adequately distinguish conduct which amounts to bribery from conduct which is legally innocent. Cf., United States v. Brewster (D.C.Cir. 1974) 506 F.2d 62, 78-79, 83.

Not every gift, favor or contribution to a government or political official constitutes bribery. It is universally recognized that bribery occurs only if the gift is coupled with a particular criminal intent, e.g. United States v. Brewster, supra; Neely v. United States (9th Cir. 1960) 274 F.2d 389; United States v. Labovitz (3rd Cir. 1958) 251 F.2d 393; State v. Brewer, 258 N. C. 533, 129 S. E. 2d 262, appeal dismissed, 375 U. S. 9 (1963); People v. Lyons, 4 Ill. 2d 396, 122 N. E. 2d 809 (1954); People v. Johnston, 328 Mich. 213, 43 N. W. 2d 334 (1950). That intent is not supplied merely by the fact that the gift was motivated by some generalized hope or expectation of ultimate benefit on the part of the donor, see United States v. Brewster, supra (dealing with campaign

contributions) and Dukehart-Hughes Tractor & Equipment Co. v. United States (Ct. Cl. 1965) 341 F.2d 613 (tax case holding, inter alia, that "goodwill" gifts and favors to government officials did not contravene Iowa bribery statute). "Bribery" imports the notion of some more or less specific quid pro quo for which the gift or contribution is offered or accepted. See, e.g., United States v. Brewster, supra, at 81:

> No politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation. There must be more specific knowledge of a definite official act for which the contributor intends to compensate before an official's action crosses the line between guilt and innocence.

This requirement of criminal intent would, of course, be satisfied if the jury were to find a "course of conduct of favors and gifts flowing" to a public official in exchange for a pattern of official actions favorable to the

donor even though no particular gift or favor is directly connected to any particular official act. United States v. Baggett (4th Cir. 1973) 481 F2d 114, cert. denied 414 U. S. 1116 (1973) (Travel Act[7] prosecution involving alleged bribery of Maryland County Commissioner). Moreover, as the Seventh Circuit has held, it is sufficient that the gift is made on the condition "that the offeree act favorably to offeror when necessary." United States v. Isaacs (7th Cir. 1974) 493 F.2d 1124, 1145, cert. denied 417 U. S. 976 (1974) (construing Illinois statute in a Travel Act prosecution). It does not follow, however, that the traditional business practice of promoting a favorable business climate by entertaining and doing favors for potential customers becomes bribery merely because the potential customer is the government. Such expenditures, although inspired by the hope of greater government business, are not intended as a quid pro quo for that business: they are in no way conditioned upon the performance of an official act or pattern of acts or upon the recipient's express or implied agreement to act favorably to the donor when necessary.

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[7] 18 U.S.C. § 201.

See Dukehart-Hughes Tractor & Equipment Co. v. Hughes, supra, at 615-616.

As the alleged bribees in this case were West Virginia government and party officials, the most relevant definition of bribery is that of West Va. Code Ann. § 61-5A-3 (Supp. 1975) which, reduced to essentials, provides that bribery is the payment or acceptance of "(a)ny pecuniary benefit as consideration for the recipient's official action as a public servant or party official ..." (Emphasis added). While the West Virginia courts do not appear to have considered the point, it is reasonably certain that this statute was not intended to depart from the general rule as to the requisite criminal intent discussed above. Indeed, the use of the contractual term "consideration" indicates that the benefit must be given in exchange or as compensation for official action- and not merely as an unconditional gift with the hope that a favorable business climate will result- in order to be classified as bribery.[8]

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[8] The conclusion that West Virginia does not consider "goodwill" expenditures to constitute bribery is bolstered by the fact that West Va. Code Ann. § 61-5A-6 (Supp. 1975), which prohibits certain gifts and gratuities to public servants excludes from its coverage "trivial gifts or

The crucial distinction between "goodwill" expenditures and bribery is, then, the existence or nonexistence of criminal intent that the benefit be received by the official as a quid pro quo for some official act, pattern of acts, or agreement to act favorably to the donor when necessary. In instructing on bribery, the District Court in this case was obliged to set forth that distinction with sufficient clarity to enable the jury to determine the legality of appellant's expenditures, United States v. Brewster, supra, at 83. This was not accomplished by the instruction that "payment of money to Government officials for the purpose of obtaining deposits of government funds in the bank and

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8 (Continued)

gratuities" and "social, professional or business entertainment involving no substantial risk of affecting official impartiality." (Certain campaign contributions are also excepted.) Sections 61-5A-3 and 61-5A-6 were both enacted as part of the West Virginia Bribery and Corrupt Practices Act and should, therefore, be construed in pari materia. Consequently, the exemption of goodwill expenditures from the provision of Section 61-5A-6, under which a lesser standard of criminal intent is applicable, cf. United States v. Brewster, (D.C. Cir. 1974) 506 F.2d 62 (construing federal bribery and illegal gratuities provisions) is persuasive evidence that the West Virginia legislature regarded such expenditures as legitimate business practice and did not intend to prohibit them under Section 61-5A-3.

to influence the judgment of such officials in connection with such deposits...constitutes...bribery... ." If "influence" is given its broadest common meaning, it is clear that "goodwill" gifts and favors to and entertainment of government officials are intended to influence the judgment of such officials. That is, such expenditures are made with the hope that the officials will be more likely to award government business to the donor if a favorable business climate is created than if such a climate is not established. But, as is apparent from the discussion above, this type of influence does not amount to bribery.

This defect was not cured by the Court's subsequent instruction that the Internal Revenue Code "recognizes that a business such as a bank may incur legitimate business expenditures for ordinary and necessary business purposes to create a favorable business climate and to promote its relationship with present and potential customers." Even if the jury understood this to mean that "goodwill" expenditures are not bribery, the instruction did not explain how to differentiate such expenditures from those

which do constitute bribery.[9] Moreover, when the jury subsequently requested supplemental instructions, the Court repeated its instruction on bribery but not the one on legitimate business expenditures- thereby diluting or destroying any remedial effect which the latter might have had.

The determination of whether appelant used bank money to bribe state and party officials was, in this case, a crucial step in ascertaining whether he was guilty of misapplying that money within the meaning of 18 U.S.C. § 656. Consequently, the vagueness in the District Court's instructions with respect to the distinction between bribery and legitimate goodwill expenditures rendered them fatally

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9 The resultant ambiguity may explain one somewhat puzzling aspect of the jury's verdict. Despite substantial similarity in appellant's testimony with respect to his use of the funds to which Counts Two and Seven pertain (on each occasion he bought tickets to Democratic Party dinners from RyKoskey), he was acquitted on Count Two and convicted on Count Seven. A compromise resulting from jury uncertainty as to the exact line of demarcation between bribery and lawful goodwill expenditures is at least one possible explanation for this apparent inconsistency. "A defendant is entitled to more than a possible jury room compromise, he is entitled to have his guilt or innocence voted up or down on the clearest possible lines of distinction." United States v. Brewster (D.C. Cir. 1974) 506 F. 2d 62, 83.

defective and a new trial is, therefore, warranted.[10]

III

When the jury, unable to reach a verdict, requested supplemental instructions, the District Court instructed, inter alia, that

> the term "injure" as used in this statute...is to be used in its ordinary and normal sense. It means to do injustice to; to harm, impair and tarnish the standing of. It is any wrong and damage done to another, either in his person, rights, reputation or property.

Appellant contends that this instruction was erroneous and we agree.

In defining a term such as "injure" where such term is within the contemplation of a statute, courts should generally look to the purpose underlying the statute in

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10 It should, perhaps, be noted that while the facts in United States v. Caldwell, supra, were in some ways similar to those in this case, the two cases differ in significant respects. First, the issue in Caldwell was not the adequacy of the trial court's instructions but the legal sufficiency of the indictment and of the evidence, id., slip opinion at 3. Moreover, in contrast to the

ascertaining the meaning of such term.[10a] The purpose of 18 U.S.C. § 656 being to protect the assets of the Federal Deposit Insurance Corporation and of banks having a federal relationship, see United States v. Wilson (5th Cir. 1974) 500 F 2d 715, cert. denied 420 U. S. 977 (1975); Garrett v. United States (5th Cir. 1968) 396 F. 2d 489, cert. denied 393 U. S. 952 (1968) and Weir v. United States (7th Cir. 1937) 92 F. 2d 634, cert. denied 302 U. S. 761 (1937), we conclude that the term "injure" as contemplated by that statue was intended to include only pecuniary loss. While damage to a bank's reputation may eventually result in some deterioration in the bank's financial condition, such loss would be too indirect and speculative and we decline to construe the statute as comprehending it. Consequently, insofar as the District Court's instructions defined "injure" as meaning anything other than to cause pecuniary loss to the bank, they were erroneous.

10a Strictly speaking, the term "injure" no longer actually appears in the statute, having been omitted in the 1948 revision. However, it has been consistently held that the revision was not intended to effect any substantive change, and intent to injure the bank remains an essential element of the offense, see, e.g., United States v. Schmidt (3d Cir. 1972) 471 F. 2d 385, 386; Golden v. United States (1st Cir. 1963) 318 F.2d 357, 361, and Seals v. United States (8th Cir. 1955) 221 F.2d 243, 245.

IV

An essential element of the offense of misapplication of bank funds under 18 U.S.C. § 656 is intent to injure or defraud the bank, e.g., United States v. Topkoph (10th Cir. 1975) 514 F. 2d 597, 603, United States v. Giordano (2nd Cir. 1973) 489 F. 2d 327, 330, and United States v. Schmidt (3rd Cir. 1972) 471 F. 2d 385, 386. In this case the District Court informed the jury of this requirement and then instructed that

> intent to injure or defraud the bank exists if you find that the defendant acted knowingly and that the natural result of his actions were (sic) to injure or defraud the bank, even though this may not have been his motive.

Appellant did not specifically object to this instruction at trial but now contends that it constituted plain error.[11] As we are remanding for other errors in the instructions, it is not necessary to decide whether this instruction was "plain" error. But we do agree with appellant that the instruction was erroneous and we set forth our views for the District Court's guidance on retrial.

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[11] See Parts II and III, supra.

An instruction that it is reasonable to infer that a person ordinarily intends the natural and probable consequences of his voluntary acts has generally been held proper, see, e.g., United States v. Trexler (5th Cir. 1973) 474 F. 2d 369, cert. denied 412 U.S. 929 (1973); and United States v. Wilkinson (5th Cir. 1972) 460 F. 2d 725. As the Court said in Wilkinson:

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act or conscious omission. Any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant possessed the required criminal intent. (p. 733)

The instruction as given here, however, went beyond this and created a finding of intent based upon the inferences stated.[12] This was improper.

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[12] In Benchwick v. United States (9th Cir. 1961) 297 F. 2d 330, 33, n. 5, the Court said:

> (Specific intent) may not be supplied by a conclusive presumption from given facts,

(Continued on next page)

We conclude, therefore, that the challenged instruction was erroneous in that it directed, rather than permitted, the finding of the fact of intent "as the natural result of his actions." As a practical matter, it may be improbable that appellant would have been able to dissuade the jury from drawing the permissible inference; but he was entitled to an opportunity to try. The District Court's instruction deprived him of that opportunity.

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12 (Continued)

> since that would, in effect, eliminate the requirement of specific intent from the statute. * * * (Therefore) defendant's intent to injure and defraud the bank could be inferred as a matter of law from any particular circumstance, even the long-continued practice of drawing checks on insufficient funds.

The issue before the court in Benchwick was the sufficiency of the evidence and not the propriety of the charge. The rationale of the quoted passage is, however, instructive as to the propriety of an instruction creating a conclusive presumption.

CONCLUSION

Because the trial court's charge with respect to the distinction between bribery and lawful goodwill expenditures was inadequate and because its instructions on the meaning of "injure" and "intent to injure or defraud" were incorrect, this case must be remanded for a new trial. In view of our holding with respect to the trial court's instruction, we need not and do not reach appellant's other assignments of error.

REVERSED AND REMANDED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-1535

United States of America,

Appellee,

v.

Keith L. Arthur,

Appellant.

Appeal from the Unites District Court for the Southern District of West Virginia, at Huntington. John T. Copenhaver, District Judge.

Argued October 7, 1977 Decided October 25, 1977

Before BUTZNER and WIDENER, Circuit Judges, and THOMSEN, Senior District Judge, Sitting by Designation.

Dennis W. Dohnal (Bremner, Baber & Janus on brief) for appellant; Wayne Rich, Jr., Assistant United States Attorney (John A. Field, III, United States Attorney on brief) for appellee.

PER CURIAM:

Keith L. Arthur appeals from an order of the district court denying his plea of double jeopardy. Cf. Abney v. United States, 97 S.Ct. 2034 (1977). We previously reversed the initial judgment of his conviction because of error in the trial court's charge to the jury, and we remanded the case for retrial. United States v. Arthur, 544 F2d 730 (4th Cir. 1976). He now contends that retrial is barred because the evidence at the first trial was insufficient to support a conviction.

We find no merit in this contention. In our first opinion, we ruled that the evidence would have been sufficient to sustain the verdict if the jury had been properly instructed. 544 F2d at 734. We now find no occasion for reexamining this issue. Forman v. United States, 361 U.S. 416 (1960); Bryan v. United States, 338 U.S. 552 (1950); see United States v. Tateo, 377 U.S. 463, 465, (1964).

The judgment of the district court is affirmed and the clerk is directed to issue the mandate forthwith.

WIDENER, Circuit Judge, concurring:

I concur in the result.

I, however, would not rely on a finding that the evidence would have been sufficient had the jury been

been properly instructed, but would simply decline to weigh the evidence before an improperly instructed jury as if it had been properly instructed. Bryan v. United States, 338 U.S. 552 (1950), allows such a solution in a more strained cause than is the one before us. In addition to the theoretical problem I have in adjudicating a case only hypothetical, evidence seldom comes out the same in a second trial, and nuances, inferences, and the purport of testimony are better left to the trial court after the introduction of evidence in the second trial, not as it was in the first or might be in the second.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF WEST VIRGINIA

AT CHARLESTON

UNITED STATES OF AMERICA

V. CRIMINAL ACTION NO. 74-32-H

KEITH L. ARTHUR

O R D E R

On the 13th day of January, 1978, came the United States of America by Wayne A. Rich, Jr., Assistant United States Attorney, and came also the defendant, Keith L. Arthur, in person and by Dennis W. Dohnal, his counsel.

The defendant having been convicted of ten violations of Title 18, United States Code, Section 656, as charged in the within ten-count indictment, as that indictment appears as renumbered at the request of the defendant in the trial of this case and filed herein as Court's Exhibit No. 1, and the Court this day having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary was shown or appeared to the Court;

IT IS ADJUDGED that as to count one of the within indictment the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of THREE (3) YEARS and fined the

sum of ONE THOUSAND ($1,000.00) DOLLARS. Said fine shall be inclusive with the fine imposed under count one and not cumulative.

IT IS ADJUDGED that as to count three of the within indictment the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of THREE (3) YEARS and fined the sum of FIVE THOUSAND ($5,000.00) DOLLARS. Said fine shall be inclusive with the fine imposed under counts one and two and not cumulative.

IT IS ADJUDGED that as to count four of the within indictment the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of ONE (1) YEAR and fined the sum of ONE THOUSAND ($1,000.00) DOLLARS. Said fine shall be inclusive with the fine imposed under counts one, two and three and not cumulative.

IT IS ADJUDGED taht as to each of counts five, six, seven, eight, nine and ten of the within indictment the defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of THREE (3) YEARS and no fine is imposed.

It is further ORDERED that the sentences of

imprisonment imposed under counts one, two, three, four, five, six, seven, eight, nine and ten shall run concurrently with each other.

It is further ORDERED that the execution of the sentences of imprisonment imposed under counts one, two, three, four, five, six, seven, eight, nine and ten is suspended and the defendant is placed on probation for terms of THREE (3) YEARS as to each of said counts, upon the terms and conditions prescribed by law and in accordance with the General Provisions of Probation Form No. 7, and in addition in accordance with the following Special Conditions of Probation: 1) the defendant shall accept full-time employment without salary at any charitable organization in the State of West Virginia as approved by the Probation Department and the Court for TWO (2) YEARS; and 2) the fine herein imposed shall be paid within thirty days from this date.

It is further ORDERED that the terms of probation imposed under counts one, two, three, four, five, six, seven, eight, nine and ten shall run concurrently with each other.

Thereupon, the Court advised the defendant that he had ten (10) days from this date within which to appeal the foregoing conviction and sentence.

The Clerk of this Court is directed to serve upon counsel of record and the defendant herein certified copies of this order.

ENTER: January 18, 1978

/s/ John T. Copenhaver, Jr.
JOHN T. COPENHAVER, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-5098

United States of America,

Appellee,

v.

Keith L. Arthur,

Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. John T. Copenhaver, Jr., District Judge.

Argued May 11, 1979 Decided August 3, 1979

Before WINTER, BUTZNER and PHILLIPS, Circuit Judges.

Dennis W. Dohnal (Bremner, Baber & Janus on brief) for Appellant; E. Leslie Hoffman, III, Assistant United States Attorney (Robert B. King, United States Attorney, and Wayne A. Rich, Jr., Assistant United States Attorney on brief) for Appellee.

WINTER, Circuit Judge:

As a result of his second trial, defendant was convicted on ten counts of misapplication of bank funds in violation of 18 U.S.C. § 656. His initial conviction on these same charges was reversed by us because of improper jury instructions in United States v. Arthur, 544 F.2d 730 (4 Cir. 1976) (Arthur I), and we affirmed the district court's rejection of defendant's claim of double jeopardy when the government elected to try him anew. United States v. Arthur, No. 77-1535 (4 Cir., October 25, 1977) (unpublished) (Arthur II).

Defendant attacks the validity of his second conviction on the grounds that (1) the evidence was legally insufficient to show that in his misapplication of bank funds he intended to injure the bank, and (2) the district court committed reversible error in admitting his testimony at his first trial into evidence at the second. Defendant also contends that the district court abused its discretion when it prescribed as a condition of probation that he accept full-time employment without salary at any charitable organization in the State of West Virginia approved by the probation department and the district court for a period of two years.

We are not persuaded by any of defendant's arguments. We affirm.

I.

The theory of the government's case and much of the evidence is set forth in our opinion in Arthur I. Briefly stated, the government adduced evidence that defendant was president and a director of the Valley National Bank (Valley), in Huntington, West Virginia. He also served as county clerk, an elected position which he had occupied for seventeen years. The evidence showed that defendant drew money on at least ten separate occasions from a "Borrowers' Life Insurance Account" at Valley for purposes of increasing "goodwill" toward Valley. This account held funds which Valley had earned as commissions on life insurance policies sold in connection with loans. Defendant used funds from this account to pay favors to various people, in particular Assistant State Treasurer RyKoskey. RyKoskey made day-to-day decisions on depositing West Virginia treasury funds, and defendant gave him various gifts to induce him to deposit state funds at Valley. These favors included gifts of $120 worth of postage stamps

to enable RyKoskey to make political mailings, paying RyKoskey's expenses at a golf outing, and the like. RyKoskey's favors totaled about $1,000. The effort evidently paid off, since RyKoskey maintained a non-interest-bearing account for the state at Valley that often amounted to $700,000. Occasionally, when defendant found that Valley's reserves were tight and in need of a large deposit, the would call RyKoskey, who would oblige him by transferring some state funds from another bank to the state's account in Valley. In addition, defendant made political gifts to other local political figures from the Borrowers' Account in the total amount of about $600.

Defendant testified at his first trial, and at his second trial the government made known its intention to offer into evidence and read to the jury the transcript of defendant's testimony at the first trial, deleting only testimony which related to the eight counts on which defendant had been acquitted. Defendant objected to this use of his prior testimony on a number of substantive grounds. In a hearing outside the presence of the jury, the district court overruled these objections, but it raised a question as to whether defendant's prior

testimony had been given with knowledge that he was not required to testify or to make any statement for or against himself. When defense counsel declined to stipulate the point, the district court called defendant as a witness; and when defendant testified that he could not recall whether he had been advised that he had a right not to testify, and the district court indicated that it would not admit his prior testimony unless the government called defendant's prior counsel as witnesses and interrogated them as to the advice that they had given the defendant, the government called the lawyers as witnesses. Although both attorneys invoked the attorney-client privilege and defendant declined to waive the privilege, the district court required both lawyers to answer. They both testified that they had advised defendant with respect to his right not to testify, whereupon the district court permitted the edited transcript of defendant's prior testimony to be read to the jury.

II.

It is settled that an essential element of misapplication of bank funds in violation of § 656 is

the intent to injure or defraud the bank. See Arthur I, 544 F.2d at 736. Defendant concedes that the jury was properly instructed on this point, but he contends that there was not legally sufficient evidence to support a finding of such intent and therefore the district court should have granted his motions for judgment of acquittal. Specifically, defendant relies upon the holding in Arthur I that § 656 required an intent to inflict pecuniary injury, not merely injury to reputation or community standing, and he asserts that the evidence establishes that his intent in making disbursements from the Borrowers' Life Insurance Account was to increase goodwill to Valley and to bring it pecuniary benefit.

We reject this contention. It is answered completely by United States v. Caldwell, 544 F.2d 691 (4 Cir. 1976). There, in rejecting the contention that evidence of a similar scheme of payments and gifts to public officials failed to show intent to injure the bank because in fact the purpose of the scheme was to benefit the bank, we said:

> The defendant's wrongdoing was complete at the time when he made illegal payments in accommodations and services to Kelly and RyKoskey and their wives; at that point, defendant had misapplied bank funds by

> using the money for an illegal purpose. Such misapplication injured the bank, and as such gave rise to the inference that the defendant had the requisite intent . . . .
>
> The fact that the defendant had as his ultimate goal the unlawful preferment of the bank by Kelly and RyKoskey is irrelevant. Uniformly it is held that the promise or hope of a better life to come for the bank does not render lawful that which was unlawful . . . . Nor is it essential to a conviction that the proof show an intent permanently to deprive the bank of its property.

Id. at 696-97.

In deciding defendant's first appeal, we did not depart from Caldwell. In Arthur I, Judge Russell, writing for the court, was careful to note that, unlike Arthur I where the conviction was reversed, "the issue in Caldwell was not the adequacy of the trial court's instructions but the legal sufficiency . . . of the evidence." 544 F.2d at 736 n.10. Thus, read together, Caldwell and Arthur I stand for the proposition that a jury in a § 656 prosecution must be properly instructed that intent to inflict pecuniary injury to the bank is an essential element of the offense, but that a jury may properly find that such intent existed when the proof shows the expediture of bank funds to bribe public officials. By this test, the proof in the instant case

was legally sufficient to support a finding of the requisite intent.

Indeed, in this case, the proof was even stronger than in Caldwell, because here defendant was himself a public office holder and the jury could conclude that defendant's expenditure of Valley's funds was intended to advance defendant's political fortunes rather than to aid the bank. Moreover, Valley had an established fund for legitimate goodwill expenditures, so that it could be inferred from defendant's clandestine use of another fund that he possessed the requisite criminal intent. Finally, we note that in Arthur I we stated that, if the jury had been properly instructed, the evidence would have sustained defendant's conviction, 544 F.2d at 734, and we relied on this statement in denying defendant's claim in Arthur II that retrial was barred.

III.

Defendant correctly concedes that "it may be permissible . . . to allow the prosecution to introduce in its case the recorded testimony of an accused from an earlier trial proceeding . . . " (Appellant's

Brief pp. 10-11). See Edmonds v. United States, 273 F.2d 108, 112-13 (D.C. Cir. 1959) (in banc), cert. denied, 362 U.S. 977 (1960). See also United States v. Anderson, 481 F.2d 685, 696 (4 Cir. 1973) (prior testimony at state hearing), aff'd. 417 U.S. 211 (1974), cf. Fed. Evidence Rule 804(b) (1). He contends, however, that introduction of his prior testimony was improper, because (a) it clearly revealed that an earlier trial had been held and the jury could infer that defendant had been convicted, all to his prejudice, and (b) the prior testimony contained evidence in response to testimony of government witnesses not presented at the second trial. Further, defendant contends that the district court violated his fifth amendment privilege in calling him as a witness to establish the voluntariness of his prior testimony, and that the district court permitted his attorney-client privilege to be infringed when it required his lawyers to disclose the advice they had given him about his right not to testify.

We do not think that admission of the prior testimony was improper, although we agree that there was serious errors, albeit not grounds for reversal, in the manner in which admissibility of the prior testimony

was established. We discuss these seriatim.

Of course, the prior testimony disclosed that defendant had testified in a previous trial. But we do not think that the testimony necessarily showed that defendant was the person being tried. Certainly it did not show that defendant was convicted. In short, we see no substantial prejudice to defendant. While his testimony contained references to facts not in issue at the second trial, again we see no prejudice. The references put in context the prior testimony which was relevant in the second trial. That context was not so inflammatory that we think that the jury was prejudiced. At most, defendant would have been entitled to a limiting instruction to the effect that certain designated answers were admitted to provide the context for relevant evidence but that they were not to be considered in deciding the issues submitted to the jury. However, defendant made no such request.

There was error in the manner in which the district court established to its satisfaction the admissibility of the previous testimony. The fifth amendment right of an accused not to incriminate himself includes the right not to take the stand at all, and this right was violated

when defendant was called as a witness by the court and interrogated about the advice given him about his right not to testify at the first trial. Further, we may assume for present purposes that such advice, if any, had been given in confidence and that his attorney-client privilege was therefore violated when his prior lawyers were compelled to testify. The district court was led into these errors by its commendable concern for the defendant's rights. But as we view the case, interrogation of the defendant and his counsel was unnecessary. The transcript which was offered showed on its face that defendant was represented by counsel at the first trial and that he was called by them as a witness in his own defense. In the absence of any evidence to the contrary, we think that there was a presumption that defendant had been fully advised of his rights before he testified. If there was any question about whether his testimony was given with full knowledge of his rights, it was incumbent on him to make the claim and come forward with evidence to rebut this presumption. If he offered his own testimony in support of his claim, he would waive his fifth amendment privilege and, if he asserted that his lawyers

had not advised him properly, he would also waive the attorney-client privilege.

Although error, these violations of defendant's rights do not constitute reversible error. We are convinced that they were harmless beyond a reasonable doubt because they had no effect whatever on the outcome of the trial. See Chapman v. California, 386 U.S. 18 (1967). The interrogation of defendant and his counsel took place out of the presence of the jury and the jury was not told what had occurred. The prior testimony, as we have held, was admissible. The jury thus had no improper knowledge to affect its deliberations. The error was neither so egregious nor the likelihood of its repetition so substantial that we think that we should exercise our supervisory power to disturb the verdict.

IV.

We do not think that the district court abused its discretion in the condition that it imposed upon the granting of probation. Generally a sentencing court has very broad discretion in imposing conditions on probation, so long as the conditions bear "a reasonable relationship to the treatment of the accused and the protection of the

public." United States v. Pastore, 537 F.2d 675, 681 (2 Cir. 1976). We do not suggest that compelling charitable service is an appropriate condition of probation in every case, but we think it an acceptable one here. Certainly the rehabilitative potential of such service is greater than the rehabilitative program of most prisons. The donation of charitable services to the community is both a deterrent to other potential offenders and a symbolic form of restitution to the public for having breached the criminal laws.

A F F I R M E D,

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-5098

United States of America, Appellee,

v.

Keith L. Arthur, Appellant.

O R D E R

Upon consideration of the appellant's motion for substitution of counsel and for stay of the mandate, along with a petition for rehearing and no judge having requested a poll on the suggestion for rehearing en banc,

IT IS ORDERED that:

1. the motion for substitution of counsel is GRANTED;

2. the motion for stay of mandate is DENIED;

3. the petition for rehearing is DENIED.

Entered at the direction of Judge Winter for a panel consisting of Judge Winter, Judge Butzner and Judge Phillips.

For the Court

/s/ William K. Slate, II
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-5098

United States of America,

Appellee,

versus

Keith L. Arthur,

Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Huntington. John T. Copenhaver, Jr., District Judge.

Upon consideration of a motion of the appellant, by counsel, for stay of mandate pending application to the United States Supreme Court for a writ of Certiorari,

IT IS ORDERED that the motion is DENIED.

For the Court - by Direction.

/s/ William K. Slate, II
CLERK

SUPREME COURT OF THE UNITED STATES

No. A-304

KEITH L. ARTHUR,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 8, 1979

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 24th day of October, 1979